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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KATELYN M., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

NATHAN G.,

Defendant and Appellant.

D043871

(Super. Ct. No. EJ02284B)

APPEAL from an order of the Superior Court of San Diego County, Gary M. Bubis,  
Judge. Affirmed in part, reversed in part.

Nathan G. appeals an order of the juvenile court rejecting his status as a presumed father of his biological daughter, Katelyn M., striking his name from the dependency petition and denying him reunification services. We agree that the court erred in striking Nathan's name from the petition and reverse the order in that respect. Otherwise, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Kristin E. and Nathan conceived Katelyn, although the couple later separated and Nathan moved to Oregon shortly thereafter. In May 1997, Kristin married Ryan M. and the following month she gave birth to Katelyn. Ryan raised Katelyn as his own child.

Nathan and Katelyn met for the first time in December 1998, when Nathan was visiting San Diego. Although Kristin told Nathan he was Katelyn's biological father, she asked Nathan not to inform Katelyn about that so as not to disrupt Ryan's relationship with Katelyn. Nathan honored this request.

Nathan moved back to San Diego in January 1999, but by that time Kristin and Ryan had moved to Arizona. Kristin and Ryan separated in May 1999 and Kristin brought Katelyn back to San Diego. During that summer, Katelyn visited Nathan's home "100 times" and spent the night at the home of Nathan's mother on several occasions. Nathan saw Katelyn frequently and often babysat Katelyn at Kristin's home.

Kristin and Katelyn returned to Arizona to live with Ryan in August 1999 and Nathan had no contact with Katelyn until May or June 2000, when Kristin and Ryan again separated; Nathan saw Katelyn three or four times over that summer, but had no contact with her at all after September 2000.

Kristin and Ryan reunited again but separated for a final time in December 2002. Ryan had primary custody of Katelyn, as well as the couple's two children, Johnathon and Kelsey, although he shared custody jointly with Kristin.

In March 2003, after the children returned from a visit with Kristin, Ryan discovered bruises on one-year-old Johnathon's face, back, thighs and chest and took him to a doctor and

then to the emergency room at Children's Hospital. Medical staff there concluded that the bruises were nonaccidental, something Kristin later admitted to Ryan, and contacted the San Diego Sheriff's Office and Child Protective Services. (All further dates are in 2003 except as otherwise specified.) In the proceedings to dissolve Kristin and Ryan's marriage, the family court issued an order precluding Kristin from having unsupervised visits with the children.

In June, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition on Johnathon's behalf and the juvenile court placed Johnathon with Ryan, subject to supervised visitation by Kristin. Notwithstanding this order, Ryan became overwhelmed and turned the children over to Kristin a week later. After becoming aware that Kristin had the children, the Agency detained Johnathon in a foster home and instructed Ryan to retake custody of the girls, which he did.

In early July, the Agency filed dependency petitions on behalf of Katelyn and Kelsey and detained the girls with Ryan. Prior to the detention hearing, Ryan filed a statement of paternity and offer of proof that he was the father of all three children. At the hearing, the court found that Ryan was a presumed father of all three children and amended the dependency petition relating to Katelyn to add Nathan as an alleged father.

A week later, the court received a letter from Nathan indicating that he was Katelyn's biological father, requesting the appointment of counsel to represent him in the dependency proceedings and requesting a determination of his status as Katelyn's biological father. In the letter, Nathan admitted he had not had contact with Katelyn for approximately two and a half years.

At the July 24 jurisdictional and dispositional hearing on the petition relating to Katelyn, the court appointed counsel for Nathan and, based on a stipulation by Kristin and Ryan, found that Nathan was Katelyn's biological father. It made true findings on the petition and, in accordance with the Agency's recommendation, placed Katelyn with Ryan's mother. It denied without prejudice Nathan's request for visitation and ordered the parties not to discuss paternity issues with the child.

At the six-month review hearing, Nathan renewed his request for visitation with Katelyn and the court set the matter for a contested trial in February 2004, asking the parties to brief the issue of Nathan's participation in the proceedings and his entitlement to visitation. Nathan filed a motion to establish a parental relationship with Katelyn, indicating that he did not wish to supplant Ryan's relationship with Katelyn, but merely desired to commence contact with her so that he and his family could provide additional love and support for her and so she could meet his other daughter. He argued in part that he was a presumed father pursuant to Family Code section 7611, subdivision (d) (all statutory references are to the Family Code unless otherwise specified), and *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*). The Agency opposed Nathan's request.

At the contested trial, Nathan withdrew his request for custody of Katelyn because in January 2004 he had been arrested for being in possession of stolen property and negligently discharging a firearm and he was currently incarcerated in connection with those offenses. The court denied Nathan's request for presumed father status, finding that he did not qualify for such status in accordance with the statutory criteria, and that, even if Nathan did qualify, Ryan's qualifications exceeded Nathan's and supported a determination that Ryan was

Katelyn's presumed father. The court also denied Nathan's request for services and, on its own motion, struck Nathan's name from the petition. Nathan appeals.

## DISCUSSION

### 1. *Denial of Presumed Father Status*

Dependency law recognizes three types of fathers: presumed, alleged and biological. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15; see Welf. & Inst. Code, § 361.5; compare *In re Crystal J.* (2001) 92 Cal.App.4th 186, 190 [recognizing a fourth category of "de facto fathers" for those who have assumed the role of parent on a day-to-day basis].) A presumed father is a man who meets one or more statutorily specified criteria. (§ 7611.) A biological father is one whose paternity of the child has been established, but who has not established that he qualifies as the child's presumed father. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.) An alleged father is a man who may be the father of the child but who has not established biological paternity or presumed father status. (*Ibid.*) Only a presumed father has a right of custody and a right to reunification services, as necessary to regain custody of a dependent child (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 451) although the juvenile court may provide services to a biological father if it determines that the provision of services will benefit the child. (Welf. & Inst. Code, § 361.5, subd. (a).) One who claims he is entitled to presumed father status has the burden of establishing, by a preponderance of the evidence, the facts supporting that entitlement. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.)

Here, Nathan concedes that Ryan qualified as Katelyn's presumed father, but argues that the court's finding of paternity was sufficient to establish that he also was a presumed

father pursuant to section 7611, subdivision (d), which recognizes presumed father status for a man who "receives the child into his home and openly holds out the child as his natural child." However, we must uphold the juvenile court's denial of presumed father status if it is supported by substantial evidence in the record. (*In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1652.) In light of the absence of any evidence that Nathan received Katelyn into his home, even for a limited period, or that he showed the level of familial commitment necessary to establish that he openly held her out to be his natural child, we conclude that the juvenile court's denial of presumed father status to Nathan is amply supported by the record.

Nathan acknowledges the limited nature of his past contacts with Katelyn, but argues that the court could not deny him presumed father status on that basis, in accordance with the analysis of *Kelsey S.*, *supra*, 1 Cal.4th 816. There, the California Supreme Court held that in an adoption proceeding the statutory distinction between natural fathers and presumed fathers "is constitutionally invalid . . . to the extent it is applied to an unwed father who has sufficiently and timely demonstrated a full commitment to his parental responsibilities." (*Id.* at p. 849.) In *In re Jerry P.* (2002) 95 Cal.App.4th 793 (*Jerry P.*), the court applied the analysis of *Kelsey S.* in the context of a dependency proceeding. There the juvenile court denied presumed father status (and thus reunification services) to a biological father who had established a loving and nurturing parental relationship with his son, but who, through no fault of his own, had never been able to take the son into his home. The appellate court reversed, concluding that to the extent section 7611 and the related dependency statutes disallowed presumed parent status to a biological father who "promptly comes forward and demonstrates as well as he can under the circumstances a full commitment to his parental

responsibilities -- emotional, financial and otherwise," the statutory scheme violated the biological father's equal protection and due process rights. (*Jerry P.*, *supra*, 95 Cal.App.4th. at p. 812.)

Nathan contends that the evidence here shows that, once Kristin told him that Katelyn was his child, he received Katelyn into his home whenever he was able to do so, that he had a loving relationship with Katelyn and that the only reason Katelyn did not know he was her father was because he respected Kristin and Ryan's desire to maintain a parent-child relationship between Katelyn and Ryan. However, while Nathan's response to the circumstances were admirable, his limited contacts with Katelyn and the nature of his relationship with her do not establish the level of commitment necessary to create equal protection and due process concerns similar to those discussed in *Kelsey S.* and *Jerry P.*

Even if we were to accept Nathan's argument that he qualified as a presumed parent pursuant to section 7611, subdivision (d) and/or *Kelsey S.*, this would not be the end of our analysis. Although more than one individual may meet the statutory criteria for presumed father status, there can be only one presumed father. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 603, quoting *In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1115.) Thus, if more than one person qualifies as a presumed father under the statutory criteria, the court must weigh the conflicting presumptions and accord presumed father status to the person as to which the presumption is "founded on the weightier considerations of policy and logic . . . ." (§ 7612, subd. (b).). This directive recognizes that "[t]he paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child" and reflects a legislative goal of preserving an existing parent-child relationship that

affords a child social and emotional strength and stability. (*Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1116.) We review the court's determination of the presumed father based on a weighing of conflicting presumptions arising under section 7611 under an abuse of discretion standard. (*In re Jesusa V.*, *supra*, 32 Cal.4th at pp. 606-607.)

Here, the evidence showed that from the time of Katelyn's birth, Ryan held out Katelyn as his own child and demonstrated a consistent commitment to his parental responsibilities. Although Nathan contends that Ryan's interest in Katelyn (as well as the other children) has diminished since her removal, Ryan explained to the social worker that he was having problems with his mother (with whom the children are placed) and did not want to argue with her in front of them.

In contrast to Ryan's long-term relationship with Katelyn, Nathan's relationship with her was sporadic, with consistent visitation only for a three or four month period in 1999, when she was two-years old. Although Katelyn visited numerous times and spent the night at Nathan's mother's home on several occasions during that time, Nathan never took Katelyn into his home to live. Thereafter Nathan had no contact with Katelyn until the following summer, when he saw her three or four times, but then had no contact with her at all.

The relevant question is whether Nathan has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights of reunification services and custody. (See *Jerry P.*, *supra*, 95 Cal.App.4th at p. 793; see also *In re Sarah C.* (1992) 8 Cal.App.4th 964, 972.) Here, the record is clear that Ryan has, and Nathan lacks, a substantial familial relationship with Katelyn. In light of Ryan's consistent parental commitment to Katelyn, we



cannot conclude that the trial court erred in determining that considerations of policy and logic weighed in favor of Ryan's status as the presumed father. (See *Steven W. v. Matthew S.*, *supra*, 33 Cal.App.4th 1108 [upholding a finding of presumed fatherhood by the man who had an enduring father-child relationship with the child, rather than the child's biological father who had not undertaken a paternal role in the child's life].)

Finally, Nathan contends that the court should have deferred its determination of the presumed father issue and, in the interim, allowed him to have visits with Katelyn in a therapeutic setting. However, Nathan's argument disregards the purpose of providing reunification services, which is to *reunite* a family, not create one in the first instance. (*In re Sarah C.*, *supra*, 8 Cal.App.4th at p. 975.) In the face of uncontroverted evidence that Nathan did not have an established parental relationship with Katelyn, the juvenile court was not required to defer its presumed father determination.

## 2. *Striking of Nathan's Name from the Petition and Denial of Services*

Nathan's final contentions are that the juvenile court erred in striking his name from the dependency petition and that it improperly failed to consider whether providing him with reunification services is in Katelyn's best interests. As the Agency concedes, the former contention is well taken because the identification of another man as a child's presumed father does not terminate the biological father's legal relationship with the child. (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 610; see *Kelsey S.*, *supra*, 1 Cal.4th at p. 849 [a biological father's due process rights prohibit the termination of his parental relationship with the child absent a showing that he is unfit as a parent].) Accordingly, we reverse the juvenile court's order insofar as it strikes Nathan's name from the petition. However, further proceedings are

not necessary on the issue of reunification services because the juvenile court already considered the issue and denied Nathan's request for services on the merits.

#### DISPOSITION

The juvenile court's February 25, 2004 order is reversed to the extent that it strikes Nathan's name from the dependency petition filed on Katelyn's behalf. In all other respects, the order is affirmed.

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McINTYRE, J.

WE CONCUR:

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McCONNELL, P.J.

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O'ROURKE, J.